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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. SHANNON STARR, Defendant and Appellant.	A151277 (Alameda County Super. Ct. No. C160921)

A jury found defendant Shannon Starr to be a sexually violent predator (SVP) as defined under the Sexually Violent Predator Act (SVPA), Welfare and Institutions Code[1] section 6600 et seq. The court committed defendant to the custody of the State Department of State Hospitals (SDSH) for an indeterminate term. On appeal, defendant argues that he was denied due process of law because of excessive delay in bringing him to trial and failure to give a requested pinpoint jury instruction. He further argues that the SVPA violates the equal protection, double jeopardy, and ex post facto clauses of the United States Constitution. We affirm.

FACTUAL AND PROCEDURAL HISTORY

On April 28, 2009, the People filed an SVPA petition alleging that defendant had been convicted of one count of forcible rape (Pen. Code, § 261.2), one count of forcible oral copulation (Pen. Code, § 288a, subd. (c)), and one count of assault with the intent to

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

commit rape (Pen. Code, § 220). As is required for SVP petitions, the People also alleged that defendant was in prison and that two mental health professionals had determined that he was a danger to the health and safety of others because he was likely to engage in further sexually violent, predatory criminal behavior because of a currently diagnosed mental disorder.[2]

I. Evidence Introduced at the SVP Trial Regarding Defendant's Violent and Sexual Misconduct

In 1990, M.[3] accepted a ride home from defendant one night. Defendant drove into the Oakland Hills to an isolated, dark, and winding road. M. was afraid and got out when he stopped the car. Defendant also got out, then slapped M. and forced her to bend over the car. He had a gun. He pulled down her pants and had sex with her. Then, holding the gun, defendant made M. orally copulate him. Later, when he dropped M. off, defendant threatened to kill her if she said anything about what happened. Defendant was convicted of forcible rape (§ 261, subd. (a)(2)) and forcible oral copulation (§ 288, subd. (c)).

In 1991, K., who was 16, accepted defendant's offer to drive her home and then to her cousin's house. Defendant drove to a dark, unpopulated area. He came to the passenger side of the car, opened the door with his penis out, and told K. to get out and bend over. She refused, defendant pushed and slapped her, and he got back into the car. Defendant reached into K.'s bra, unzipped her pants, and said he had a gun. K. got out of the car and escaped. Defendant was convicted of assault with intent to commit rape (§ 220).

In 1992, I. agreed to meet defendant at a BART station. There, defendant offered her a ride home but drove to his home instead. When the two went into defendant's

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[2] Prior to filing a petition for commitment of an SVP, section 6601 requires that two mental health evaluators perform an evaluation of the alleged SVP and concur that he or she has a diagnosed mental disorder such that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody. (§ 6601, subds. (a)–(f).)

[3] To respect the privacy of the victims, we refer to them only by first initial.

apartment, he deadbolted the door. Defendant pinned I. to the floor, and they wrestled, as I. tried to keep defendant from taking off her clothes. She pleaded for him to let her leave. He removed her pants and forced his penis into her anus. Then, while still pinning her to the floor, he spent a half an hour watching television.

Defendant then said something to the effect that "he took that break for [I.], for a rest, and now the real fun is going to start." He asked her "to jack him off . . . and stuff, more sexual stuff." He placed I. in a chokehold. She stuck her fingernails into his forearm, and he punched her in the eye. He told I. that she should feel privileged that he was even looking at her. He gave her three choices—"jack him off, suck his dick or get broken in two"—and she masturbated him. Afterwards, he offered her a soda, suggested "not too much foreplay" next time, and that they might go out for dinner next time.

Defendant's ex-wife, who had been married to defendant twice, testified that they fought a lot during their marriages, defendant often wanted her to fight him physically, and he liked it when she did. After they physically fought, he would make her have sex with him although she did not want to. On one occasion, defendant's violence put her in the hospital overnight.

Defendant's ex-wife also testified about the incident that caused her to end her relationship with defendant in 2006. They had been fighting, and defendant followed her up the stairs. On the landing, he choked her. He then dragged her up the stairs, threw her on the bed, and started hitting her hard. During these events, defendant said, "Go ahead, bitch, fight back. You know I like it when you do."

II. Events Leading to the SVP Trial

After the People filed the SVPA petition, defendant appeared in court on May 29, 2009 and waived time for his probable cause hearing. The court found good cause to detain him under section 6601.5. From May 29, 2009 through December 19, 2014, defendant engaged in numerous time waivers for his probable cause hearing and made

numerous motions to dismiss the petition, appoint new evaluators, and pursuant to *People v. Marsden* (1970) 2 Cal.3d 118.[4]

On December 19, 2014, after obtaining newly appointed counsel following the public defender's conflict of interest, defendant requested a probable cause hearing as soon as practical. The parties agreed to February 27, 2015, but the date was continued to May 8, 2015 at defendant's request. The court heard testimony from the People's first mental health evaluator on May 8, 2015, and the parties stipulated to continue the hearing with the People's second evaluator on June 19, 2015.

The June 19, 2015 hearing did not go forward because of events that rendered the courthouse closed off to access from the sheriff's buses. The parties appeared in July 2015 to reschedule the probable cause hearing. The People stated that their expert had been ready to testify on June 19, 2015, but he was on a preplanned vacation and was under subpoena in other cases until August 21, 2015. Defendant objected to a continuance based on undue delay, but the court found good cause to continue the matter.

After hearing the People's second evaluator testify in August 2015, the court found probable cause to believe that defendant was an SVP. The court granted defendant's request to remain in local custody rather than be taken to a state mental hospital. The court also raised trial setting. The People requested a discovery compliance hearing in 90 days to afford time to subpoena defendant's medical records from jail. The People also informed the court that defendant had retained an expert, but that expert had not had an opportunity to assess defendant. Defendant's counsel agreed to the 90-day request; defendant asserted his right to proceed to trial as soon as possible, though conceded at the same time that he needed time to speak to his expert. The court set a trial-setting hearing for November 6, 2015.

On November 6, 2015, defendant moved to represent himself, and the court set a hearing on this motion to allow the People to respond. At the December 18, 2015

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[4] *Marsden* motions involve a defendant's claim that he or she is entitled to new counsel because of current counsel's inadequate representation. (*Marsden*, *supra*, 2 Cal.3d at pp. 123–124.)

hearing, defendant withdrew his motion, said that he wished to pull his "time waiver," and requested trial in January 2016. The People requested a trial date of April 11, 2016 and a discovery compliance date of March 4, 2016, stating their expert reports would not be completed until mid-February and requesting time for discovery because defendant had just provided his expert report. The court set a discovery compliance hearing for March 4, 2016 and trial for April 11, 2016.

On April 11, 2016, defendant requested a trial continuance because his counsel had another trial and his expert would not be ready until June 2016. The court granted the request, and it denied without prejudice defendant's motion to dismiss the petition for violation of his procedural due process right to a speedy trial.

On June 6, 2016, the People requested a trial continuance because their experts were unavailable due to other trials and vacation and because defendant had not yet provided one of his expert reports. Defendant's counsel waived defendant's appearance but stated that defendant was in the building and he had spoken to him. Defendant's counsel did not object to the continuance.

On July 18, 2016, the case was assigned out for trial. On July 27, 2016, the court granted defendant's motion in limine to exclude the testimony of one of the People's evaluators because she had failed to record her interview with defendant as required by a court order. After the exclusion, the People moved under section 6603, subdivision (c) to appoint a replacement evaluator.[5] Over defendant's objection, the court granted the motion and continued the trial.

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[5] Under section 6603, subdivision (c)(1), if one or more of the evaluators upon whom the People relied in filing the SVP petition are "no longer available to testify for the petitioner in court proceedings," the People may request a replacement evaluation. " '[N]o longer available to testify for the petitioner in court proceedings' means that the evaluator is no longer authorized by the Director of State Hospitals to perform evaluations regarding sexually violent predators as a result of any of the following: [¶] (A) The evaluator has failed to adhere to the protocol of the State Department of State Hospitals. [¶] (B) The evaluator's license has been suspended or revoked. [¶] (C) The evaluator is unavailable pursuant to Section 240 of the Evidence Code. [¶] (D) The independent professional or state employee who has served as the evaluator has resigned

At the August 26, 2016 trial-setting hearing, defendant announced that hernia pain prevented his participation in the proceeding. The People informed the court that defendant had also denied their replacement evaluator's request to interview him because of his pain. Defendant's counsel stated that defendant would interview with the evaluator after surgery, and the court issued an order to the sheriff for defendant to have surgery forthwith. The matter was continued.

On September 23, 2016, defendant did not appear for medical reasons. On October 14, 2016, defendant's counsel appeared and requested a two-week continuance. On October 28, 2016, defendant was present and reported that he had been taken for surgery but had not received surgery due to confusion over his identity. He requested that the court set a trial date and stated that, because he desired to proceed, he would not interview with the new evaluator. The People asked for trial on January 9, 2017, and defendant did not object to that date. Both parties also requested a status hearing in December. In requesting these dates, the People explained that neither party had met with their experts because of the prior surgery issue and the parties wanted to set a trial date with the understanding that it was fluid and may have to move to accommodate the experts. Defendant did not object.

At the status hearing in December 2016, the People announced they would seek to continue the trial date because their replacement evaluator had not finished her report and was unavailable in January 2017. On January 6, 2017, the People moved orally to continue the trial and defendant opposed. The court denied the motion without prejudice to the filing of a written motion. On January 9, 2017, the court granted the People's written motion to continue and set trial for February 21, 2017. On February 10, 2017, the court denied defendant's motion to dismiss the petition for violation of his procedural due process right to a speedy trial.

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or retired and has not entered into a new contract to continue as an evaluator in the case, unless this evaluator, in his or her most recent evaluation of the person subject to this article, opined that the person subject to this article does not meet the criteria for commitment." (§ 6601, subd. (c)(2).)

The case went to trial on February 21, 2017. In addition to the evidence regarding defendant's violent and sexual misconduct previously described herein, two expert witnesses called by the People opined that defendant was an SVP and two experts gave contrary opinions for defendant. The jury found that defendant was an SVP, and the court committed him for an indeterminate term.

DISCUSSION

I. Due Process

SVP proceedings are creatures of statute (§ 6600 et seq.) first enacted in 1995. (Stats. 1995, ch. 763, § 3, p. 5922.) We need not provide a detailed explanation of the SVPA, as the California Supreme Court has done so on numerous occasions. (*Reilly v. Superior Court* (2013) 57 Cal.4th 641, 646; *In re Lucas* (2012) 53 Cal.4th 839, 845; *People v. McKee* (2010) 47 Cal.4th 1172, 1183, 1185 (*McKee I*).) Suffice it to say, as amended in 2006, the SVPA provides for indeterminate involuntary civil commitment of certain offenders following completion of their prison terms where the People prove beyond a reasonable doubt that the offenders are SVPs. (*McKee I*, *supra*, 47 Cal.4th at pp. 1186–1187.)[6]

The law governing an alleged SVP's due process right to a timely trial is a more recent development, because the SVPA does not specify a time by which a trial on a commitment proceeding must be commenced or concluded. (*People v. Landau* (2013) 214 Cal.App.4th 1, 27 (*Landau*).) The court in *People v. Litmon* (2008) 162 Cal.App.4th 383, 395 (*Litmon*) first recognized that the federal due process clause extends to involuntary civil commitments under the SVPA.

In *Litmon*, the appellate court reviewed established procedural due process decisions of the United States Supreme Court that explained "that substantive rights

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[6] " 'Sexually violent predator' means a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).)

relating to 'life, liberty, and property . . . cannot be deprived except pursuant to constitutionally adequate procedures' [citation]—and they enforce, in various settings, the fundamental due process right to be heard ' "at a meaningful time and in a meaningful manner." ' " (*People v. Castillo* (2010) 49 Cal.4th 145, 165.) "Based upon this authority, and other high court cases applying these principles in the context of involuntary civil commitment and treatment (see *Heller v. Doe* (1993) 509 U.S. 312 [concerning procedures relating to involuntary commitment of mentally retarded persons]; *Washington v. Harper* (1990) 494 U.S. 210 [state prison inmate has no right to a judicial hearing prior to being forcibly medicated with antipsychotic drugs]; *Addington v. Texas* (1979) 441 U.S. 418 [concerning standard of proof in an involuntary civil commitment proceeding]), the appellate court in *Litmon* concluded that although a person alleged by petition to be an SVP has no statutory 'speedy trial' right, such a person nevertheless has a federal due process right " 'to be heard at a 'meaningful time.' " (*Castillo*, at p. 165.)

The *Litmon* court then assessed the procedural due process claim before it under the three-part test in *Mathews v. Eldridge* (1976) 424 U.S. 319, in which the United States Supreme Court articulated a balancing test for resolving what process is constitutionally due in a case involving the administrative termination of Social Security disability benefits, as well as under the four-part test in *Barker v. Wingo* (1972) 407 U.S. 514 (*Barker*), in which the United States Supreme Court set forth criteria by which courts are to judge alleged violations of the Sixth Amendment right to a speedy trial. (*Litmon*, *supra*, 162 Cal.App.4th at pp. 399–406.)

Since *Litmon*, neither the California Supreme Court nor the United States Supreme Court has decided what test applies to due process claims in an SVP proceeding. However, the parties agree that *Barker* supplies the appropriate test under which to evaluate whether the particular pretrial delay in defendant's case denied him due process, so we proceed under *Barker*.

A. The Barker *Test*

Under *Barker*, the court considers four factors when determining whether a delay has resulted in a denial of due process: the length of delay, the defendant's assertion of his right, prejudice to the defendant, and the reason for the delay. (*Litmon, supra,* 162 Cal.App.4th at p. 398.) None of these four factors is a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. (*Barker, supra,* 407 U.S. at p. 533.) Instead, they are related factors and must be considered together with other relevant circumstances. (*Ibid.*) "[T[hese factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." (*Ibid.*) The burden of demonstrating a speedy trial violation lies with the defendant. (See *id*. at p. 532.)

In this case, almost eight years passed between the filing of the petition and trial. However, it does not necessarily follow that defendant suffered a due process violation, and our analysis of *Barker*'s due process factors leads us to conclude that he did not.

1. Length of Delay

" 'The first *Barker* factor, the length of the delay, encompasses a "double enquiry." [Citation.] "Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay [citation], since, by definition, he cannot complain that the government has denied him a 'speedy' trial if it has, in fact, prosecuted his case with customary promptness. If the accused makes this showing, the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim. [Citation.] This latter enquiry is significant to the speedy trial analysis because . . . the presumption that pretrial delay has prejudiced the accused intensifies over time." ' " (*People v. Superior Court* (*Vasquez*) (2018) 27 Cal.App.5th 36, 60–61 (*Vasquez*), quoting *People v. Williams* (2013) 58 Cal.4th 197, 234.)

The People argue that the delay to be considered here is 20 months because defendant agreed to continue the matter up to June 19, 2015. Defendant counters that the entire delay must be taken into account and triggers a *Barker* analysis. Whether almost

eight years or 20 months, the delay was sufficiently lengthy to trigger a *Barker* analysis. (*Litmon, supra,* 162 Cal.App.4th at p. 405 [one-year delay "create[d] a presumption of prejudice that triggers a *Barker* type of balancing test"]; see *Doggett v. U.S.* (1992) 505 U.S. 647, 652, fn. 1 ["lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year"].)

Nonetheless, the majority of delay was at defendant's request or with his consent. For example, defendant does not challenge the time that passed before June 19, 2015 or between August 21, 2015 and December 18, 2015. By requesting a January 2016 trial date, defendant implicitly consented to the time that passed through January 2016. (See *Landau, supra,* 214 Cal.App.4th at pp. 42–43 [excluding the time up to defendant's requested trial date from the delay to be considered in an SVP procedural due process challenge]; cf. *People v. Ford* (2015) 61 Cal.4th 282, 288–289 [where defendant did not object to a continuance of the restitution hearing to a date beyond his probationary term, he can be understood to have consented to the court's jurisdiction to hear the matter].) Defendant then requested and consented to the delay from April 11, 2016 until July 18, 2016 when the case was first assigned to a department for trial. After his trial was continued on July 27, 2016, on September 23, 2016, defendant did not appear for medical reasons, and, on October 14, 2016, the matter was again continued at his counsel's request. Finally, the court set a January 9, 2017 trial date in October 2016 without objection to the date. Taking into account the entirety of the record, the delay in this case, while not insignificant, does not weigh strongly in defendant's favor. (See *Landau, supra,* 214 Cal.App.4th at p. 37.)

2. Defendant's Assertion of His Right

"*Barker* rejected 'the rule that a defendant who fails to demand a speedy trial forever waives his right.' [Citation.] But the high court cautioned that its rejection of the demand-or waiver-rule did not mean that a defendant has no responsibility to assert his right. [Citation.] Rather, 'the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right.' " (*People v. Williams, supra,* 58 Cal.4th at p. 237.) " 'The issue is not simply the

number of times the accused acquiesced or objected; rather, the focus is on the surrounding circumstances, such as the timeliness, persistence, and sincerity of the objections, the reasons for the acquiescence, whether the accused was represented by counsel, the accused's pretrial conduct (as that conduct bears on the speedy trial right), and so forth. [Citation.] The totality of the accused's responses to the delay is indicative of whether he or she actually wanted a speedy trial.' " (*Id.* at p. 238.)

At many hearings after June 2015, defendant raised due process objections and concerns. Defendant moved to dismiss the petition for violation of his due process rights in April 2016 and in February 2017. Nonetheless, defendant did not begin objecting to continuances until many years after the petition was filed, and even after he began asserting his right to a speedy trial, defendant either sought or did not object to continuances. His sporadic assertion of his right thus does not weigh heavily in his favor.

a. Prejudice

Whether a defendant suffered prejudice as a result of the delay "should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect . . . (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." (*Barker*, *supra*, 407 U.S. at p. 532.) "[L]engthy post-deprivation pretrial delay in an SVP proceeding is oppressive." (*Litmon*, *supra*, 162 Cal.App.4th at p. 406.) Courts recognize, "it is the loss of time spent in pretrial custody that constitutes prejudice." (*Vasquez*, *supra*, 27 Cal.App.5th at p. 63; see *Barker*, at pp. 532–533 ["The time spent in jail is simply dead time."].) However, of the three interests, "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." (*Barker*, at p. 532.)

Defendant undisputedly lost time in custody because of the challenged pretrial detention. However, he does not suggest that any witnesses were unavailable at trial because of the delay or that any would have given more favorable trial testimony at an earlier date. Nor does he submit any evidence that his mental status changed while he

was awaiting trial, such that it would have been more advantageous to him to proceed at an earlier date. Thus, this factor is not itself conclusive.

b. Reason for the Delay

In the *Barker* analysis, the reason for the delay is the "flag all litigants seek to capture." (*U.S. v. Loud Hawk* (1986) 474 U.S. 302, 315.) "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay." (*Barker, supra,* 407 U.S. at p. 531, fn. omitted.)

The June 19, 2015 probable cause hearing was continued because the courthouse was inaccessible to sheriff's buses. The People stated that this inaccessibility was outside of everyone's control, and defendant did not object or argue that this statement was inaccurate. Although "any chronic, systematic post-deprivation delays in SVP cases that only the government can rectify must be factored against the People'' (*Litmon, supra,* 162 Cal.App.4th at p. 403), this delay does not appear to have systemic causes. The People's expert was then unavailable until August 21, 2015, but the People could not be faulted for failure to subpoena him when he had been ready to testify on the date set. (Cf. *Litmon, supra,* 162 Cal.App.4th at pp. 405–406 [the prosecutor's failure to subpoena witnesses for nine months prior to a set trial date did not justify further trial delay].) This continuance does not weigh against the People.[7]

[7] Appellant cites *Owens v. Superior Court* (1980) 28 Cal.3d 238 as the governing authority for when a court may grant a continuance for witness unavailability. *Owens* addressed the requirements to find good cause to continue a criminal trial beyond the time limits in Penal Code section 1382. (*Id.* at p. 250.) Whether a court abused its discretion in allowing a continuance under the Penal Code is a different issue from whether a criminal defendant or an SVP's constitutional right to due process was violated. (See *People v. Shane* (2004) 115 Cal.App.4th 196, 202 ["it is axiomatic that a violation of Penal Code section 1382 does not automatically result in a concomitant violation of the federal constitutional right to a speedy trial"].)

The period of time between December 18, 2015 and the first trial date of April 11, 2016 similarly does not weigh against the People. In December 2015, defendant dropped a motion to represent himself and requested a January 2016 trial. No trial date had been set, and the parties had agreed to come back in November (pushed to December because of defendant's motion) to set trial. Further, the People had just received defendant's expert report and requested time to subpoena his records. The People sought an April 11, 2016 trial date, stating their experts would complete reports in mid-February. The time that passed between January 2016 and April 11, 2016 was not an unreasonable period to allow for trial preparation, and no deliberate delay is indicated.

As to the period between April 11, 2016 and July 18, 2016, defendant's counsel requested a nearly two-month continuance and then did not object to a second continuance. Contrary to his assertion on appeal, defendant's counsel's request for a continuance is attributed to defendant (*Vermont v. Brillon* (2009) 556 U.S. 81, 90–91), and the latter delay does not weigh in defendant's favor given his lack of objection.

The delay from July 27, 2016 to October 28, 2016 had multiple causes. First, the court continued the trial one month to allow the People to obtain a replacement evaluator after excluding the testimony of one of their evaluators. Section 6603, subdivision (c)(1) allows the People to request a replacement evaluator "[i]f one or more of the original evaluators is no longer available to testify for the petitioner in court proceedings." The court found that its exclusion rendered the People's expert unavailable, but defendant contends that the court could only conclude the evaluator was unavailable if she was also "no longer authorized by the Director of Mental Health to perform evaluations regarding sexually violent predators." (§ 6603, subd. (c)(2).) We need not resolve this question because, even assuming that the People could request a replacement evaluator under section 6603, subdivision (c), the SVPA did not require them to try the case with two experts. (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1062–1065.) Thus, this continuance is attributed to the People.

The next delay of approximately two months can be attributed equally to the People and defendant. Defendant said he would interview with the People's replacement

evaluator, but, by the end of August 2016, he refused to do so until after surgery. Defendant had not received surgery by the end of October 2016 because of a mix up with his identity at the hospital, but this mix up does not appear to have been caused by chronic or systemic failure. The trial-setting hearing was then continued from September 23, 2016 to October 28, 2016, first because of defendant's medical issues and then because his counsel requested a two-week continuance.

The final one-month-and-11-day continuance occurred because the People's replacement evaluator had not finished her report and was unavailable in January 2017. The People claim defendant is responsible for this delay because he violated a court order requiring him to interview with the evaluator in December 2016, which in turn delayed the evaluator's report. But the court set a trial date with the understanding that defendant would not interview. Further, the refusal occurred almost a month before trial. The People's failure to prepare thus weighs against them. However, we do not give this great weight because when the court set the January trial date, the People stated on the record that neither side had spoken to their experts, the trial date was set "with the understanding that it is somewhat of a fluid date," and the date might need to be moved to accommodate experts; defendant did not object.

Looking to all the *Barker* factors, defendant was in pretrial custody for a lengthy period and asserted his right to trial within a reasonable time on a number of occasions, but he did not consistently act in accordance with this right. Some continuances after June 2015 were attributable to the People, but none stems from chronic, systemic failures or deliberate delay, and some were attributable to defendant. Defendant agreed to many of the continuances and did not object to the setting of a final, somewhat "fluid" trial date. On this record, no procedural due process violation occurred.

II. Jury Instruction Error

The court denied defendant's request for the following modified version of CALCRIM No. 3454: "In order to find that Respondent meets the criteria as a sexually violent predator, as that term is described in these instructions, Petitioner must prove that: [¶] 1. Respondent suffers from a diagnosed mental disorder, as defined elsewhere in these

instructions; [¶] and [¶] 2. that diagnosed mental disorder must cause Respondent to have serious difficulty in controlling his sexually violent behavior; [¶] and [¶] as a result of that diagnosed mental disorder, he is a danger to the health and safety of others because it is likely that he will engage in sexually violent predatory criminal behavior."

Instead, the court gave the standard CALCRIM No. 3454 instruction: "The petition alleges that Shannon Starr, also known as Kenneth Brinston, is a sexually violent predator. To prove this allegation, the People must prove beyond a reasonable doubt that: [¶] 1. He has been convicted of committing sexually violent offenses against one or more victims; [¶] 2. He has a diagnosed mental disorder; [¶] And [¶] 3. As a result of that diagnosed mental disorder, he is a danger to the health and safety of others because it is likely that he will engage in sexually violent predatory criminal behavior. . . . [¶] . . . The term *diagnosed mental disorder* includes conditions either existing at birth or acquired after birth that affect a person's ability to control emotions and behavior and predispose that person to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others."

Defendant contends that the court should have sua sponte instructed the jury that, in order to find that he was an SVP, the jury must find that he had serious difficulty in controlling his sexually violent criminal behavior. In support, defendant points to *Kansas v. Crane* (2002) 534 U.S. 407, 413 (*Crane*), in which the United States Supreme Court held that the federal constitution requires that in a civil commitment proceeding "there must be proof of serious difficulty in controlling behavior." According to defendant, the jury instruction given was constitutionally insufficient in violation of *Crane* because it did not require the jury to find that his mental disorder results in a significant lack of behavioral control.

However, defendant acknowledges that the California Supreme Court rejected a similar claim in *People v. Williams* (2003) 31 Cal.4th 757, 759 (*Williams*). In *Williams*, an SVP challenged his commitment, arguing that the jury had not received a pinpoint instruction regarding the need to find serious difficulty in controlling behavior as required by *Crane*. (*Id.* at pp. 759–760.) The court held that specific impairment-of-control

instructions are not constitutionally required in California, reasoning that the SVPA's language "inherently encompasses and conveys to a fact finder the requirement of a mental disorder that causes serious difficulty in controlling one's criminal sexual behavior." (*Id.* at pp. 759, 776–777.) Thus, a standard jury instruction based on the SVPA's language sufficed. (*Id.* at p. 759.) This court is bound by *Williams*, which, as discussed therein, does not conflict with *Crane*. (*Williams*, *supra*, 31 Cal.4th at pp. 770–775.) Defendant's instructional error claim fails. (*Auto Equity Sales, Inc. v. Superior Court* (2003) 57 Cal.2d 450, 455; see also *People v. Field* (2016) 1 Cal.App.5th 174, 182–184 (*Field*) [rejecting defendant's assertion of error premised on failure to provide a pinpoint instruction stating that defendant's mental diagnosis must cause him serious difficulty in controlling his behavior].)

III. Equal Protection

A. Defendant's Refusal to Interview

In his first equal protection challenge, defendant argues that the introduction of evidence regarding his failure to interview with the People's evaluator, Dr. Longwell, and the prosecutor's comment thereon in closing argument violated his right to equal protection because the California Supreme Court has held that similarly situated persons found not guilty by reason of insanity (NGIs) cannot be compelled to testify at civil commitment extension hearings (*Hudec v. Superior Court* (2015) 60 Cal.4th 815 (*Hudec*)), and for equal protection purposes, SVPs are similarly situated to NGIs (*People v. Curlee* (2015) 237 Cal.App.4th 709 (*Curlee*)). Defendant forfeited this claim by failing to object, and, in any event, he has not established reversible error.

1. Additional Background

While the court addressed which pre-instructions to read to the jury before trial, the People objected to the reading of an instruction stating that an SVP has a right not to testify at trial and requested the parties revisit the instruction's propriety at the end of trial. The People said they intended to introduce evidence of defendant's failure to interview with one of their evaluators and argued that *Curlee* did not give an SVP an

absolute right not to testify in court. Defendant's counsel disagreed, arguing that *Curlee* afforded defendant an absolute right not testify. Defendant's counsel also said that he believed it would be *Griffin* error[8] for the People to comment on defendant's refusal to interview. The court decided that it would read the instruction regarding an SVP's right not to testify and stated the *Griffin* comment went to a separate issue—whether *Curlee* rendered moot the statutory requirement that alleged SVPs meet with an evaluator—that had not been fully argued or discussed and could be addressed at another time.

The People introduced evidence that defendant refused to interview with Dr. Longwell at trial without objection. Over defendant's subsequent objection before closing arguments, the court permitted the People to argue that defendant's failure to obey a court order requiring him to interview with Dr. Longwell was inappropriate and could be considered by the jury. The prosecution mentioned this once during his closing: "Dr. Longwell didn't interview the respondent. You will have in evidence an order that said he was required to interview with her but he chose not to. What does that tell you about the respondent? He knows that the evidence he would present to Dr. Longwell would not help him."

2. Analysis

"Equal protection requires the state to treat similarly situated persons alike, with some exceptions in which the disparate treatment is sufficiently related to the purpose of the [law] in question." (*People v. Jacobs* (1992) 6 Cal.App.4th 101, 103.) The "similarly" situated inquiry examines whether two groups are similarly situated for purposes of the law challenged, not whether they are similarly situated for all purposes. (*McKee I*, *supra*, 47 Cal.4th at p. 1202.)

"Under both the United States and California Constitutions, a person has the right to refuse to answer potentially incriminating questions put to him or her in any

[8] *Griffin* error occurs when the prosecution makes adverse comments about the defendant's lack of testimony or silence in the jury's presence in violation of the Fifth Amendment. (*Griffin v. California* (1965) 380 U.S. 609; *People v. Lopez* (2018) 5 Cal.5th 339, 367–368.)

proceeding; in addition, the defendant in a criminal proceeding enjoys the right to refuse to testify at all." (*People v. Dunley* (2016) 247 Cal.App.4th 1438, 1446.) "Commitment proceedings involving NGI's [Pen. Code, § 1026.5, subd. (a)], SVP's and MDO's [mentally disordered offenders, Pen. Code, § 2960 et seq.] are all civil in nature," thus these groups have no Fifth Amendment right not to testify. (*Dunley*, at p. 1446.) Nevertheless, our Supreme Court has concluded NGIs cannot be compelled to testify at commitment extension hearings because Penal Code section 1026.5, subdivision (b)(7)'s grant of "the rights guaranteed under the federal and State Constitutions for criminal proceedings" includes the right not to testify at trial. (*Hudec*, *supra*, 60 Cal.4th at pp. 826, 832.)

Following *Hudec*, numerous courts have held that SVPs and NGIs are similarly situated for purposes of the testimonial privilege. (*Curlee*, *supra*, 237 Cal.App.4th at p. 721; *People v. Flint* (2018) 22 Cal.App.5th 983, 989–992; *Field*, *supra*, 1 Cal.App.5th at p. 197; *Dunley*, *supra*, 247 Cal.App.4th 1438 at p.1443; *People v. Landau* (2016) 246 Cal.App.4th 850, 864.) Nonetheless, defendant does not cite authority holding that Penal Code section 1026.5, subdivision (b)(7) extends to NGIs a constitutional right not to interview with state mental health evaluators, nor does he cite authority extending that right to SVPs on equal protection grounds. Citing *People v. Beard* (1985) 173 Cal.App.3d 1113, 1118–1119, which held that an NGI did not have a Fifth Amendment right to refuse to speak to a mental health evaluator because questions regarding his mental health did not subject him to criminal prosecution, the People argue that defendant's claim fails because NGIs can be compelled to undergo mental health evaluations.

We need not resolve the merits of defendant's equal protection claim because he forfeited this claim by not specifically and timely objecting to the introduction of the purportedly offending evidence at trial. (See *People v. Rogers* (2006) 39 Cal.4th 826, 854.) Defendant also stayed silent despite his counsel's earlier reference to *Griffin* error and *Curlee*. Thus, one can infer that defendant chose not to object to the introduction of evidence regarding his failure to interview. (*People v. Rogers*, *supra*, 39 Cal.4th at p.

854.) Defendant's belated claim that the People could not comment on the evidence introduced without objection does not preserve his underlying claim of error. (Evid. Code, § 353.)

Even if defendant did not forfeit his challenge to the prosecutor's comment during closing argument, this comment alone did not lead to reversible error. The parties disagree regarding whether to apply the harmless error standard from *People v. Watson* (1956) 46 Cal.2d. 818 or the more stringent harmless "beyond a reasonable doubt" standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. But any error in allowing the prosecutor's comment was harmless under either. Again, defendant did not object to the introduction of evidence that he refused to interview with Dr. Longwell, so the jury heard and could consider this substantive evidence. That being the case, any error associated with the prosecutor's brief comment during closing argument was harmless beyond a reasonable doubt.

B. Indeterminate Commitment and Burden of Proof

In his second equal protection challenge, defendant asserts that the SVPA denies him equal protection because it treats SVPs more harshly than similarly situated classes of people subject to civil commitments with respect to the indeterminate commitment period and the burden of proof for release. Yet defendant acknowledges this argument was rejected in *People v. McKee* (2012) 207 Cal.App.4th 1325 (*McKee II*) and subsequent decisions agreeing with *McKee II*.

In *McKee I*, the California Supreme Court held that the SVPA, amended to increase the commitment term of SVPs from two years to an indeterminate term, was potentially unconstitutional on equal protection grounds. The Court concluded that SVPs are similarly situated to MDOs and NGIs for purposes of the term of commitment and burden of proof for release. (*McKee I*, at pp. 1203, 1207.) The court remanded the case to the trial court "to determine whether the People . . . can demonstrate the constitutional justification for imposing on SVP's a greater burden than is imposed on MDO's and NGI's in order to obtain release from commitment." (*Id.* at pp. 1208–1209.)

On remand from *McKee I*, after a 21-day evidentiary hearing, the trial court found the SVPA's indeterminate commitment provisions do not violate equal protection, and the court of appeal affirmed. (*McKee II*, *supra*, 207 Cal.App.4th at pp. 1330, 1347.) Defendant argues *McKee II* was incorrect, stating the court applied the incorrect standard of scrutiny and review, and essentially arguing that the evidence did not support the court's decision. While defendant claims that no case has addressed a challenge to *McKee II*'s standard of scrutiny and review, *People v. McDonald* (2013) 214 Cal.App.4th 1367, 1371, 1378–1379; *Field*, *supra*, 1 Cal.App.5th at page 189; and *Landau*, *supra*, 214 Cal.App.4th at pages 47–48, all appropriately rejected similar arguments. We also agree with our colleagues that *McKee II* is correct. (*People v. McKnight* (2012) 212 Cal.App.4th 860, 864; *People v. Kisling* (2014) 223 Cal.App.4th 544, 547–548; *McDonald*, at pp. 1376–1382; *Landau*, at pp. 47–48; *Field*, at pp. 191–192.)

IV. Ex Post Facto, Due Process, and Double Jeopardy Challenges

Defendant asserts that the SVPA's indeterminate term of commitment violates the double jeopardy clause, the due process clause, and the ex post facto clause of the United States Constitution. As defendant concedes, the last two claims have been expressly considered and rejected by the California Supreme Court. (*McKee I*, *supra*, 47 Cal.4th at pp. 1193 [due process], 1195 [ex post facto].) We accordingly reject them as well.

We also reject defendant's double jeopardy claim. He claims the SVPA violates double jeopardy because an indeterminate commitment with the burden placed on him to petition for release and prove that he no longer qualifies as an SVP has become punitive in nature. He also insists that the SVPA is punitive because an SVP must be committed for a year before petitioning for release and because an SVP must be sent to a facility located on the grounds of an institution under the jurisdiction of the Department of Corrections and Rehabilitation. He further argues that because the SVPA applies only to those who are convicted of crimes or are found to be NGIs, the statutory scheme affixes culpability for criminal conduct and is therefore punitive.

In finding the SVPA does not violate the ex post facto clause of the federal Constitution, our Supreme Court reviewed the statutory scheme and held that, even with

its indeterminate commitment and burden of proof, the SVPA is not punitive. (*McKee I, supra*, 47 Cal.4th at pp. 1194–1195.) We agree with this and the similar, well-reasoned conclusions reached by our colleagues in rejecting double jeopardy challenges to the SVPA. (*Landau, supra,* 214 Cal.App.4th at pp. 44–45 [rejecting a claim that the SVPA is punitive because it provides for an indefinite commitment period and requires an SVP to prove that he or she no longer qualifies as an SVP]; *Field*, *supra*, 1 Cal.App.5th at p. 189 [rejecting a claim that the SVPA is punitive because an SVP must be committed for a year before petitioning for release and must prove his or her suitability for release]; *People v. McDonald*, *supra*, 214 Cal.App.4th at pp. 1383, citing *McKee I*, *supra*, 47 Cal.4th at pp. 1194–1195 [holding that the SVPA is not punitive].) The fact that the SVPA requires confinement in a facility located on the grounds of an institution under the jurisdiction of the Department of Corrections and Rehabilitation and the fact that it applies only to those previously found guilty of a crime do not persuade us that the SVPA is punitive in nature in light of the well-reasoned authorities finding to the contrary. Because the SVPA is civil in nature, it lacks a punitive purpose, " 'an essential prerequisite' of a double jeopardy claim." (*Landau*, at p. 45.)

DISPOSITION

The judgment is affirmed.

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BROWN, J.

WE CONCUR:

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POLLAK, P. J.

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STREETER, J.